Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-492

OCTOBER TERM, 1974

STATE OF OHIO,
Petitioner,

vs.

TERRY L. GALLAGHER,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 38 Ohio St. 2d 291, 67 Ohio Opns. 2d 354. The opinion of the Court of Appeals for Montgomery County, Ohio is reported at 36 Ohio App. 2d 29, 65 Ohio Opns. 2d 17, 301 N.E. 2d 888. Both of these opinions are set forth in the Appendix to the Petition for Writ of Certiorari to The Supreme Court of Ohio which was filed in this Court on October 29, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right has been especially set up and claimed under the Constitution of the United States. The judgment of The Supreme Court of Ohio was entered on June 26, 1974. The Court denied a petition for rehearing on July 31, 1974. The petition for a writ of certiorari was timely filed on October 29, 1974, and was granted on March 31, 1975.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions which the above entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

QUESTIONS PRESENTED

I.

Should the prophylactic rules of *Miranda* be extended to a parole officer (who is a Law Enforcement Officer only in the sense that he can arrest a parole violator) when he interviews the Defendant (his parolee) in jail (but not incommunicado and not in a police dominated atmosphere) so as to exclude the parole officer's testimony offered at a later trial as to the Defendant's confession to him if the parole officer did not recite to the Defendant the *Miranda* warnings on the ground that the situation was inherently compulsory and therefore there was a violation of the Fifth Amendment to The United States Constitution, even though there was no reason to believe that the confession was unreliable or that the parole officer did anything oppressive or illegal?

II.

Assuming arguendo that a parole officer (with the aforesaid limited arrest powers) is a Law Enforcement Officer within the purview of *Miranda* and that his interview in jail with his parolee is a psychologically similar situation to that comprehended by *Miranda*, is not a complete recitation to said parolee of the *Miranda* warnings coupled with his full understanding and waiver of same, given to him a short time before said interview by police officers, sufficient compliance with *Miranda* or must said warnings be repeated at each interview so as not to vitiate an otherwise perfectly reliable statement?

STATEMENT OF THE CASE

Respondent (Terry Gallagher) was arrested on June 21, 1972 by officers of the Montgomery County, Ohio, Sheriff's Office in connection with a number of armed robberies which had occurred in that county. (A. 20 and 44). Eventually he was charged by the police of the City of Dayton, Ohio with the armed robbery of a small food store (known as the 7-11) in that city. At his trial which commenced on November 2, 1972 to the Court (Gallagher having waived a jury [R. 2][1]), the following sequence of events seems to have been established.

Gallagher and another man, known as Richard Sorrell,

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[1] R refers to the Reporter's Transcript of that trial in the Common Pleas Court of Montgomery County, Ohio.

robbed the 7-11 store at gunpoint on May 27, 1972. Sorrell, the only one who exhibited a gun, pointed his gun at Alex Dean, the manager of the store, demanded, and obtained some money. Gallagher, saying nothing, stood beside Sorrell, moved to the wall, and then left with him. Together they walked along the front of the store to the parking lot beside it; approximately thirty-five (35) feet.

Mr. Dean identified Gallagher at his trial, saying that he was wearing a blond wig and sunglasses. Two customers corroborated Mr. Dean's description of Gallagher's actions, but only one of them was able to identify him tentatively. (R. 4-98). Before Gallagher was arrested, Mr. Dean had selected photographs of he and Sorrell from a group of photographs presented to him by Detective Walsh of the Dayton Police Department as being those of the robbers. (R. 26-34, 50-53, 178-180). This identification had survived a pre-trial motion for suppression on due process grounds.

On the morning of June 22, 1972, Detective Walsh and Detective Wright of the Montgomery County Sheriff's Office questioned Gallagher and Sorrell separately. Previous to the questioning of Gallagher, Detective Walsh, using a printed form, recited the *Miranda* warnings to Gallagher who signified his understanding and waiver rights delineated thereby by signing the waiver form. (A. 22-25).

Gallagher had been paroled on February 22, 1972 from the Lebanon Correctional Institution (an Ohio limited security prison) and Bill Sykes, an Ohio Parole Officer, was assigned to his case. (A. 51). Since Gallagher was still under the supervision of the Ohio Parole Authorities, Mr. Sykes, on June 26, 1972, went to the Montgomery County Jail to talk to Gallagher and ask Gallagher if he

would tell him why he was there: but Gallagher said he did not want to talk. (A. 51, 52, 53). Then, on July 3, 1972, on a return visit by Mr. Sykes, Gallagher, in an informal conversation and without prompting (A. 64), told Mr. Sykes in full the details concerning the armed robbery of the 7-11 including the facts that he was carrying a gun and wearing a wig and sunglasses. (A. 54-57). As a result of this conversation, Mr. Sykes recovered a wig from the then residence of Gallagher. (A. 58, 59; State's Exhibit 3, A. 59).

No use was made by Mr. Sykes of any of the *Miranda* warnings. (A. 64).

Gallagher testified at the trial on November 8, 1972.[2] (A. 74-84). He denied being in the 7-11 store (A. 74) and denied implicating himself in the robbery to Mr. Sykes by stating that he merely related to Mr. Sykes a version of what the police had accused him of doing. (A. 76, 77). However, Gallagher admitted that the wig Mr. Sykes had recovered belonged to him. (A. 76). On cross-examination, Gallagher admitted that he was not forced to talk to Mr. Sykes, that he waived his *Miranda* rights, and that his statements to Mr. Sykes were voluntarily given. (A. 77, 79).

The Court's verdict on November 14, 1972 was that Gallagher was guilty of Armed Robbery and, on November 30, 1972, he was sentenced to 10 to 25 years in the Ohio State Penitentiary.

Mr. Dean testified to open the trial and then the prosecution offered Detective Wright. (A. 19 ff). At the conclusion of his testimony concerning the rights waiver by Gallagher, the Court conducted a voir dire examination with respect to voluntariness and to compliance with the

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[2] This case was tried in segments on November 2nd, 3rd, 8th, and 14th, 1972.

Miranda decision. (A. 19-48).

After hearing from Detectives Wright and Walsh, the Court then rejected any testimony of theirs which might be offered as to any admissions of Gallagher's guilt on the sole ground that, if any were made, they were involuntary. (A. 50). No mention was made by the Court, or by anyone else for that matter, of any irregularity in the procedure whereby Gallagher was apprised of and waived his 5th and 6th Amendment rights to silence and to a lawyer. (A. 48-50).

When Mr. Sykes' testimony as to Gallagher's confession to him was offered, there was an objection based only upon the assertion that any communication between he and Gallagher was privileged. (A. 52-53, 54, 55). The holding in *Miranda v. Arizona*, 384 U. S. 436 (1966) was not mentioned at that time, but later, in his oral argument for a dismissal at the conclusion of the State's case in chief (A. 69-73), touched upon that case while Mr. Schwarz, Gallagher's attorney, still disavowing his reliance thereon. (A. 71). However, after his conviction, Gallagher appealed as of right to the Ohio Second District Court of Appeals where, in his First Assignment of Error, he relied solely upon a violation of his rights under the Fifth Amendment to the Constitution of the United States allegedly violated by the admission of Mr. Sykes testimony in the absence of warnings; citing only *Miranda v. Arizona*, supra and *Mathis v. United States*, 391 U. S. 1 (1967).[2] The Court of Appeals affirmed. 36 Ohio App. 2d 29, 301 N.E. (2d) 888, 65 Ohio Opns. (2d) 17. (A. 11).

The Supreme Court of Ohio then granted leave to appeal. (A. 12, 14). In his memorandum seeking review

[2] The second and only other Assignment of Error, was, in effect, that the verdict was against the manifest weight of the evidence.

in that Court and in his brief on the merits, Gallagher assigned only one error, i.e., the overruling of his first Assignment of Error in the Court of Appeals. The reason for said alleged error by the Court of Appeals as set forth by Gallagher in both the memorandum and the brief was in not allowing his contention that the trial court violated the Fifth Amendment to The United States Constitution as imposed on the States by the Fourteenth Amendment thereto in denying him his self-incrimination privilege when it admitted his confession to parole officer Sykes. Gallagher's sole cited authorities for this contention were the United States Constitution and the *Miranda* and *Mathis* cases, supra. The Supreme Court of Ohio reversed the Court of Appeals on the ground that there was error of a constitutional dimension in the admission of said testimony of the parole officer in that Gallagher was compelled to be a witness against himself unless the warnings set forth in Miranda v. *Arizona*, supra, were first recited to him by the parole officer. 38 Ohio St. 2d 291, 67 Ohio Opns. 2d 534. (A. 14, 15, 16).

The decisions of the Ohio Court of Appeals and the Ohio Supreme Court are both set forth in the Appendix to the Petition for Writ of Certiorari herein. This Court granted a Writ of Certiorari on March 31, 1975.

SUMMARY OF ARGUMENT

In a criminal case where a parolee is interviewed or questioned by his parole officer, the *Miranda* situation is not analogous and, therefore, that case is not controlling. This is because the interviews are not "incommunicado interrogation . . . in a police dominated atmosphere." *Miranda* v. *Arizona*, 384 U.S. 436, 445. Therefore, the *Miranda* method of finding compulsion is not available.

The question thus becomes one of extending *Miranda* beyond its scope or of not doing so.

If the *Miranda* decision is not sound, it should not be extended and it is not sound because interrogation and questioning are not compulsion as meant by the compulsory self-incrimination clause of the Fifth Amendment and because honest policemen do not need a deterrent and dishonest ones won't heed it. Furthermore, the first duty of government is to protect its citizens and it cannot do this when police work is hampered by artificial rules and reliable evidence of guilt is rejected by same.

Even if the need for a prophylactic rule for policemen is conceded, there is no need for such a rule for parole officers since absolutely none of the factors which motivated the Court in *Miranda* exist in their interviews with their clients. Therefore, coerced confessions are not likely.

The institution of a prophylactic rule for parole officers would destroy their relationship with parolees and would seriously degrade the function of the parole officer. For this destruction, there are no redeeming factors, but quite to the contrary, many disabling ones; e.g., a vicious criminal could go free because the parole officer erred. The primary function of government would be seriously crippled by such a rule both in its regulative as well as in its rehabilitative efforts.

Finally, if a law enforcement officer adequately delivers *Miranda* warnings which are understood and waived, repeated warnings for repeated interviews at fairly close intervals are not necessary and should not be required since the person then knows his Constitutional Rights and cannot say that he does not know them and that he was not warned. He can exercise them at any time. This is even more forcefully true when the second interview is between a parolee (already advised) and his parole officer where no compelling influences exist. These cases should be decided on due process grounds.

ARGUMENT

I.

IN THE INTEREST OF JUSTICE, THE ABSOLUTE EXCLUSIONARY RULE OF MIRANDA V. ARIZONA SHOULD NOT BE EXTENDED TO INTERVIEWS BETWEEN PAROLE (OR PROBATION) OFFICERS AND THEIR CLIENTS BECAUSE SUCH INTERVIEWS ARE NOT INHERENTLY COMPULSORY.

Despite the fact that the parolee, Gallagher, freely and willingly told Mr. Sykes what he did (A. 64, 77), the Ohio Supreme Court decided that he was compelled to confess by a violation of the compulsory self-incrimination clause of the Fifth Amendment to The United States Constitution. That Court found compulsion in the assumption that "—a parolee is under heavy pressure to cooperate with his parole officer." 38 Ohio St. 2d 291, 297; Pet. 20[4] and that such compulsion continued in effect unless and until the parole officer, prior to questioning the parolee, issued warnings to him identical in substance to those required by *Miranda v. Arizona*, 384 U.S. 436, 444. The Court's finding was based on the *Miranda* decision which itself found that the defendants' in the four cases there involved were also compelled to confess because of "incommunicado interrogation . . . in a police-dominated atmosphere . . . without full warnings of constitutional rights." *Miranda v. Arizona*, 384 U.S. 436, 445. Thus, in neither of these cases were the statements of the individuals involved found to be "involuntary in

[4] Pet. refers to the Petition For Writ of Certiorari filed herein on October 29, 1974.

traditional terms." *Miranda*, supra, at 457. The Ohio Supreme Court followed the reasoning of a United States Fifth Circuit Court of Appeals case involving circumstances: *United States v. Deaton*, 468 F. 2d 541 (1972).

By it's decision, the Ohio Supreme Court interpreted the Compulsory Self-Incrimination Clause of the Fifth Amendment to The United States Constitution and applied it to this case and to types of factual situations like and similar to it and, in so doing, followed *Miranda v. Arizona*, supra. However, even if the *Miranda* decision should be accepted as a sound exposition of that clause of the United States Constitution, it was not available as a precedent for this case since the facts were not in point because here Gallagher was not subjected to "incommunicado interrogation . . . . in a police dominated atmosphere". *Miranda*, infra. None of the conditions found to be present in *Miranda* existed here as Mr. Sykes was not a police officer[5] and Gallagher was not really even questioned, let alone interrogated.[6] (A. 51, 53, 54, 64).

Inasmuch as the *Miranda* cases and this one do not seem to be analogous, the question then becomes one as to whether Miranda's principles of Constitutional Law should be extended to this case and to factual situations in apposition to it. As well as the United States Circuit Court case followed by the Ohio Supreme Court, there are three state cases which are somewhat similar to this one. *State v. Lekas*, 201 Kan. 579, 442 P. (2d) 11 (1968); *State v. Williams*, 486 S. W. 2d 468 (Missouri Sup. Ct. 1972); and *People v. Gastelum*, 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965). However, in those cases, the

[5] He did not have general arrest powers; only enough to arrest a parole violator. (A. 63).

[6] Interrogation: to question typically with formality, command, and thoroughness for full information and circumstantial detail: to examine in detail. Webster's Third New International Dictionary.

parole officers did interrogate the prisoners either for the police or with them and no prior warnings had been given to said subjects. Therefore, they are not in point. Five states have held that a confession given to a parole or probation officer will not be suppressed because no *Miranda* warnings were given to the confessor, viz.: *Cunningham v. Texas*, 488 S. W. (2d) 117 (1972) (Texas Court of Criminal Appeals); *State v. Johnson*, 202 N. W. (2d) 132 (1972) (South Dakota Superior Court); *People v. Ronald W.*, 24 N. Y. (2d) 732, 302 N. Y. S. (2d) 260, 262 (1969) (Court of Appeals); *Gilmore v. People*, 171 Colo. 358, 467 P. (2d) 828 (1970) (Colo. S. Ct.); and *Nettles v. State*, 248 So. (2d) 259 (Florida Dist. Court of Appeals, 1971). There is, therefore, a conflict on this federal issue between the State Courts and the United States Courts of Appeal.

Since there is a conflict, the question as to extending the *Miranda* doctrine cannot be resolved by a resort to authority; which leaves reason as our only guide. Before addressing the extension question directly, perhaps *Miranda* itself should be examined with respect to its cogency as constitutional law in the field of confessions.

As the writers understand it and, perforce, encapsulated, the history of the law's treatments of confessions commenced with the general rule that they were considered the best of evidence and were rejected only if, for some reason (such as a finding of threats or promises) they were found to be unreliable or untrustworthy in the search for truth. This remained the rule and it was applied with varying degrees of severity or laxity until the United States Supreme Court, in a progression from *Ashcraft v. Tennessee*, 322 U. S. 143 (1944) up through *Miranda*, supra, *Mathis v. United States*, 391 U. S. 1 (1968) and *Orozco v. Texas*, 394 U. S. 324 (1969) and

using the Fourteenth Amendment to The United States Constitution, moved from "inherent coercion" and "voluntary" rules to the per se exclusionary rule of *Miranda*, supra, wherein the compulsory self-incrimination clause of the Fifth Amendment was applied to confessions to law enforcement officers in state criminal cases. Wigmore, Vol. III, Chadbourne Revision, Sec. 817 et. seq. And this was despite the fact that, historically and rationally, the anti-compulsory self-incrimination concept developed and was applied quite separate and apart from the untrustworthy confession concept. The anti-compulsory self-incrimination privilege was confirmed to the formal adversary proceedings before a tribunal whereas the untrustworthy confession concept was applied to the pre-trial fact gathering process.

In addition to using that clause of the Fifth Amendment, the Court strained to find compulsion in *Miranda* and, having found it in the inherently compulsory atmosphere of the police station, fashioned a sort of litmus test to determine the presence or absence of compulsion in like situations. The test was, of course, the well-known *Miranda* warnings, the absence of which when the police did not convey them to a suspect in some way and the suspect did not waive thereafter his new-found rights under the Fifth Amendment, caused an automatic rejection of any admissions or confessions which he might have given to the police; no matter how voluntary or reliable the statements might be considered to be. The Court, then, went on to say:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." Miranda, supra, 457.

The clause of the Fifth Amendment in question, however, states that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself".

But, when one considers the history of the governmental practices (Star Chamber and the like) which that clause intended to forbid in these states and the lexicographic meaning of the word "compel", it is inconceivable that the same action could be both compelled and voluntary. It is almost a contradiction in terms. And if the atmosphere somehow "compels" the confession without the warnings, how do the warnings and, or, the presence of a lawyer remove this atmospheric compulsion? This was pointed out by Mr. Justice White in his excellent dissenting opinion in *Miranda*, supra.

Perhaps realizing that it was contradictory to mate compulsion and voluntariness, the Court in *Miranda* went on to indicate that the prescribed warnings were being required in order to deter wrongful police behavior. Do they deter wrongful or righteous police behavior? It is submitted that the latter is the case, since, in the first place, the honest, moral, law-abiding policeman (which category includes the vast majority of policemen) does not need an artificial deterrent and, in the second place, it is highly questionable that such a procedure would deter the other kind of policeman because he's the only kind who cannot comprehend the utter lack of efficacy of a phony confession. Furthermore, if the Court cannot believe him when he states that he did not use coercive tactics to obtain the confession, how can it believe him when he avers that he gave the warnings?

Assuming, arguendo, that the warnings would act as a deterrent for this tiny minority of dishonest policemen, is it not more likely that, by using the warnings, the honest policemen are going to solve less crimes by not getting statements and the leads which often evolve there-

from than it is that many unreliable confessions will result without them? In addition to this, and as a matter of fact, the negligent omission, partially and completely, to deliver the *Miranda* warnings has caused, and will continue to cause, the rejection of completely voluntary and perfectly reliable statements and confessions resulting in a failure to convict the guilty perpetrators of even the most dastardly of crimes. This is hardly in keeping with the primary and sacred duty of any Government which is to protect it's citizens from predatory behavior.

Therefore, even if it is necessary in balancing the interests to sometimes accept an otherwise reliable statement which was extracted by unsavory means (this would be a rara avis, indeed, since these would almost always be rejected as being untrustworthy), in the interest of justice and truth-seeking, it should be done so that the primary duty of Government can be discharged; especially in the cases where there is no overbearing but simply a careless failure of a government official to comply with a procedure such as the *Miranda* warnings.[7]

If the foregoing considerations are correct, the decision in *Miranda*, supra, would not seem to be a valid interpretation of the United States constitutional provision in question. If this is so, and even if it is not so, it is respectfully submitted that this doctrine should not be extended from the police station to the parole, and, or, probation offices or to their procedures as the Ohio Supreme Court has done in this case. For there is even less reason to suppose that the Fifth Amendment's word "compelled" can be, by implication, extended to these officers by some sort of "inherently compelling pressure" analogy because the circumstances and conditions

[7] See Part IV of the dissent of Mr. Justice White in Miranda, supra, commencing at page 537 of 384 U. S. Reports and the opinion in Michigan vs. Tucker, 417 U. S. 433, Part IV, 446, ff.

which worried the Court in *Miranda* are not even remotely possible in the situations involving such officers and their "clients".

The interviews between parolees and parole officers could not be characterized as "incommunicado interrogation . . . in a police dominated atmosphere". We know of no instances of beatings and the like by parole officers or of parole officers flagrantly violating the law (*Miranda pp. 446-7*), nor of the use of psychological ploys and pressures by parole officers (*Miranda, 448 ff.*). The interview is not likely to evolve into an "interrogation". The parolee or probationer is not likely to be "swept from familiar surroundings into police custody [and] surrounded by antagonistic forces" (*Miranda, 461*). Quite the contrary is true, since the parolee or probationer is, by definition, a convicted criminal and thus is in very familiar surroundings and in the presence of friends, so to speak.

Indeed, this case illustrates the absence of all of those factors which worried the Court so in *Miranda* and there are no additional factors to replace them as compelling influences. There are, however, factors present in this case and which would be present in similar ones which would tend to strengthen the inclination to place credence in confessions to parole officers. These factors are: the strong desire of the parolee not to return to jail which would mitigate the possibility of his falsifying; and his former experience with prosecutions which would imply that he already is well aware of his constitutional rights.

Therefore, since the situation in this case surrounding the giving of the confession did not involve a "compelling atmosphere" nor any of the other *Miranda* factors, there is no need to require a prophylactic rule to eliminate the possibility of a false confession or to act as a

deterrent to prevent parole and probation officers from violating the law. But, Ohio (and some other States and Federal Courts) have already extended *Miranda* to this case and cases like it and Ohio has promulgated a prophylactic rule identical to *Miranda's* under the theory that the parolee (and probationer, by extension) is under "heavy pressure to cooperate with his parole officer". (Pet. 20). That is the only reason they give for finding compulsion. Any questioning involves some pressure. In that sense, only a blurted out confession would be uncompelled. We are all under pressure to tell the truth since there are many occasions when it would be easier to lie. But, surely that is not what is meant by our Constitution when it uses the words "compelled to be a witness against himself". If so, we are all compelled every day to be so. Something *more* than "heavy pressure" was meant and it was the use of force, threats, or sanctions involving life, limb, or property in order to persuade a person to implicate himself.

Further than these considerations concerning what seems to be an incorrect interpretation of the Fifth Amendment and the *Miranda case*, there are the practical implications of what would be involved in adopting the construction opted for by the Ohio Supreme Court. That Court, in its opinion, says that a confession to a parole officer given without the warnings, is "inadmissible at trial" (Pet. 20, 38 Ohio St. 2d 291, 297). This will pretty quickly be construed to mean **at a revocation hearing or proceeding.** Therefore, every time a parolee or probationer sees his officer, the warnings will have to be given and a lawyer provided, if requested. This would not seem to be a commendable method for the promotion of a healthy or beneficial relationship between the parties; nor one conducive to the rehabilitation purposes of the

parole and probation programs. This extension will, as Mr. Justice White said in *Miranda,* supra, at page 541 "measurably weaken the ability of the criminal law [through its parole and probation programs] to perform [it's] tasks."

In conclusion with respect to this question, we refer to the concept set forth in *Michigan v. Tucker*, 417 U. S. 433 at p. 450: "For when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." Even conceding the "harm" to criminals of admitting at the trial confessions related to their parole officers, when balancing the interests between these criminals and the public, who is harmed more greatly when voluntary and reliable statements such as these are suppressed or prevented from coming into existence?

It is the duty of government to protect its citizens from criminals. This will not be accomplished by suppressing evidence such as the confession in this case nor by setting up prophylactic rules whose result will be to impede the search for truth.

> "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."
>
> *Oregon v. Hass*, No. 73-1452, 95 S. Ct. 1215, 1221.

Constitutional safeguards were designed for the protection of the innocent, not the freeing of the guilty. But what constitutional safeguards were denied to Gallagher? His statement to Sykes was as much a product of his own free will as a man's statement could possibly ever be and it was confirmed by the subsequent fact of Sykes' finding

of the wig. Wigmore Vol. III § 856.

> "There is no evidence or suggestion that Hass' statements. . . . . were involuntary or coerced. He properly sensed, to be sure, that he was in 'trouble'; but the pressure on him was no greater than that on any person in like custody or under inquiry by any investigating officer." *Oregon v. Hass*, supra.

For what do we need the constitutional safeguards? Why, to insure our finding the truth. This case and *Hass*, supra, merely illustrate the viability of the fact finding processes we have and the futility, as well as the unconstitutionality, of such prophylactic rules as the Ohio Court has promulgated here under the aegis of *Miranda*. What should a good police officer do as in *Hass*, supra; stop and call a lawyer or go get the bike? What would a lawyer tell a parole violator before his interview with his parole officer; to confess?

Relevant and material and trustworthy evidence should be rejected only if it is demonstrably unreliable.

> "If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."
> *Oregon v. Hass*, 95 S. Ct. 1215, 1221.

That is the test of constitutionality which should be applied to the case at bar and to those like it.

II.

ONCE MIRANDA WARNINGS HAVE BEEN GIVEN TO A PERSON AND THEY ARE FULLY UNDERSTOOD AND THAT PERSON WAIVES HIS CONSTITUTIONAL RIGHTS, A CONFESSION OR ADMISSION OBTAINED AT A SUBSEQUENT INTERVIEW SHOULD NOT BE SUPPRESSED SIMPLY BECAUSE NO OR INADEQUATE WARNINGS WERE GIVEN TO THE PERSON PRIOR TO THAT INTERVIEW.

This case also contains the important question as to whether Miranda warnings must be repeated and again there is a conflict. However, the conflict is mild since the general rule is that the warnings do *not* have to be repeated. In a few cases, repetition is required: *Davis v. State*, 44 Ala. App. 145, 204 So. (2d) 490 (1967); *Brown v. State*, 6 Md. App. 564, 252 A. (2d) 272 (1969).

The vast majority of the cases do not require repetition:

Maguire v. United States, 396 F. (2d) 327 (9th Circuit 1968); *Miller v. United States*, 396 F. (2d) 412 (8th Circuit 1968); *United States v. Mansfield*, 381 F. (2d) 961 (7th Circuit 1967); *People v. Hill*, 66 Cal. (2d) 536, 426 P. (2d) 908 (1967); *People v. Hill*, 39 Ill. (2d) 125, 233 N. E. (2d) 367 (1968); *State v. Rowe*, 77 Wash. (2d) 955, 468 P. (2d) 1000 (1970); *United States v. Canseco*, 465 F. (2d) 383 (5th Circuit 1972); *Commonwealth v. Abrams*, 443 Pa. 295, 278 A. (2d) 902 (1971); *Watson v. State*, 227 Ga. 698, 182 S. E. (2d) 446 (1971). Again it is noted that there is a conflict between Federal Courts and State Courts on this important Federal question.

The *Maguire* case (396 F. 2d. 327) will be referred to both because it is very similar to this case and because it was cited by the Ohio Court of Appeals in its decision. Pet. 27; 36 Ohio App. 2d 29, 32-33. 301 N.E. (2d) 888, 890. In that case, Maguire was arrested by a Customs agent, then turned over to a San Diego police officer, Hammond, who gave him proper *Miranda* warnings. Three days later, a government agent, Turnage, questioned him, but his *Miranda* warnings were seemingly defective. Both Hammond and Turnage were permitted to testify. The Ninth United States Circuit Court of Appeals said:

> "Officer Hammond's warning, which was clearly adequate to meet the Miranda standards, came three

days before the interrogation of appellant by Agent Turnage; thus, even if the warning given by Turnage was insufficient, the appellant could not claim he had *not* been apprised of the *Miranda* warnings." *Maguire*, supra at p. 331.

Therefore, in the time lag between the interviews and in the fact that two different people questioned Maguire, the cases are almost identical, although it is conceded that Agent Turnage would be a law enforcement officer for *Miranda* purposes whereas it is highly questionable as to whether Parole Officer Sykes would be. But, this is just the point where this case is stronger than Maguire and the Ohio Supreme Court simply ignored this issue although it had been passed upon by the Montgomery County Court of Appeals and was briefed in both Courts. While brushing this point aside, the Ohio Supreme Court nevertheless conceded, in effect, that the prior *Miranda* warnings were proper. (Pet. 15, f.n. 2); (38 Ohio St. 2d 291, 292 f.n. 2).

Two of the cases previously cited hereinabove are also in point factually since in each of them the police fully advised the defendant of his constitutional rights and he had adequately waived those rights. Those cases are: *Gilmore v. People*, 171 Colo. 358, 467 P. (2d) 828 (1970) and *Nettles v. State*, 248 So. (2d) 259 (Fla. Dist. Ct. of Appeals). In the Florida case, the court made a very cogent observation:

> " . . . if upon every visit or contact with the probation officer the probationer is entitled to a warning then the relationship between the probation officer and the probationer would be a strained one indeed and the purpose of probation would be materially affected." 248 So. (2d), at 260.

In this case, and in others like it, as well as those involving law enforcement officers, the prior warning

should be sufficient. In the first place, Sykes was not a law enforcement officer as they were characterized by the *Miranda* decision. He had no general arrest powers (A. 63) and in *Miranda*, the term "police" was used repetitively whereas the term "law-enforcement officer" was used sparingly. Therefore, it is clear that the court was talking about policemen, F. B. I. agents, and the like. In the second place, and generally, how could Gallagher, or anyone else under the circumstances, claim he had *not* been warned and, in fact, Gallagher admitted that he had. (A. 79). Additicnally, Gallagher knew the person to whom he was talking, as do all parolees and probationers, and he knew his constitutional right to keep silent. That is illustrated by the fact that he refused to talk on Sykes' first visit. (A. 53). When he talked, he surely knew Sykes' could recommend a revocation. He probably thought he was going back anyway since he had admitted committing Armed Robbery to Detectives Walsh and Wright. Furthermore, as a parolee, he knew all about his Fifth and Sixth Amendment rights.

Gallagher had already been apprised of his Fifth and Sixth Amendment rights and had waived them. Therefore, the danger of a compelled confession which so worried the Court in *Miranda* was substantially reduced because he now knew his rights and could simply have exercised them. Also, after a man has already been warned, the rationale of the lonely man caught up in the toils of the law loses whatever reasonableness it ever did possess.

If we wish to insure a product of free choice, how many warnings do we need? Surely the insurance of the warnings does not lapse within three or four days. In reality, what is involved here is the obvious fact that if a person receives the full panoply of warnings, fully un-

derstands them, and waives the rights delineated thereby, he certainly will remember those rights three or four days later. There is, therefore, no necessity to adopt a per se rule which would automatically reject a competent, relevant, and reliable confession, made at a later time just because the warnings were not repeated.

> "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by *Miranda*. *Gorman v. United States* (1st cir.) 380 F. 2d 158, 164." *People v. Hill*, 39 Ill. (2d) 125, 233 N. E. (2d) 367, 371.

If his will is overborne at that time, the traditional "totality of the circumstances" approach will be completely adequate for the protection of his rights and of the truth-seeking process.

At the conclusion of his dissent in *Miranda*, supra, 384 U. S. at page 526, Mr. Justice Clark stated:

> "The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): 'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many has been added.

The Ohio Court, in its zeal to apply the *Miranda* decision to this situation, completely ignored the fact that Gallagher was warned, knew his rights, and did not claim that he did not know them but admitted that he was warned. By its actions in this regard, that Court has vitiated a perfectly valid, reliable, trustworthy, and voluntary confession made by a dangerous criminal; an armed robber. The temples surely have collapsed.

Since none of the conditions which evoked the *Miranda* rule in the first place are likely to exist when a succeeding interview ensues subsequent to a valid rendition and adequate understanding of the warnings given at the inception of the initial interview, a per se exclusionary rule should not be proclaimed relative to the product of that subsequent interview. Even if such a rule were contemplated, how could an intelligent one be drafted with respect to the lapse of time, number of interviews, and myriad other problems in this regard? Would one hour require more warnings, or one day? Another Ashcraft rule (*Ashcraft v. Tennessee*, 322 U. S. 143) is not needed here and now, but a return to the traditional due process method of sorting out untrustworthy confessions is.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the Ohio Supreme Court because that decision reflects an incorrect interpretation and application of the compulsory self incrimination clause of the Fifth Amendment to the United States Constitution and that this Honorable Court remand this case to the Ohio Supreme Court with instructions to reinstate and affirm the decision of the Montgomery County Court of Appeals.

Respectfully submitted,

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